COA No. 48056-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SANDRA WELLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable Barbara Johnson

REPLY BRIEF

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A. REPLY ARGUMENT

1. The cases relied upon by the Respondent do not demonstrate statutory authority in the SRA for the length of the no-contact order in this case, despite the total sentence imposed being exceptional in the form of consecutive terms.

A court may only impose a sentence authorized by statute. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). "If the trial court exceeds its sentencing authority, its actions are void." Paulson, 131 Wn. App. at 588; see also AOB, at p. 14.

The 45-year length of the no-contact order in this five-count case was beyond the maximum term of 10 years for the first degree assault, the more serious offense of the two types of conviction, and exceeded the actual term of exceptional incarceration of 20 years. AOB, at pp. 13-15 and Appendix A thereto.

The Respondent argues that where an exceptional sentence is imposed by means of running the defendant's below-maximum standard sentences for each underlying offense consecutively, as here with the prison sentence of 240 months (20 years), the SRA permits imposition of no-contact order as to the victims for a period of years equal to the consecutive total maximum *possible* terms of each of the defendant's crimes, which is 45 years.

The Respondent's reasoning begins with the note that the court's authority to impose the no-contact orders derives from RCW 9.94A.505(9), which provides the authority for imposition of no-contact order as "crime-related prohibitions." BOR, at pp. 10-12. RCW 9.94A.505(9) does provide the court with its authority to impose crime-related prohibitions, which has been deemed to include no-contact orders, per State v. Armendariz, 160 Wn. 2d 106, 113, 156 P.3d 201, 204 (2007).

Importantly, the Court in Armendariz stated that its reading of the SRA made clear the "legislature's intent to conclude that no-contact orders imposed under RCW 9.94A.505(8) may be made effective for a period up to the statutory maximum for the defendant's crime." Armendariz, 160 Wn. 2d at 120.

Respondent correctly recognizes that Armendariz does not address exceptional sentences, but reasons that because the crime-related prohibitions statute is also the source of the court's authority to impose community custody and the like, and there are cases which authorize what Respondent describes as "exceptional" terms of community custody, that exceptional no-contact orders are also

authorized, to the potential statutory maximum, run consecutively. BOR, at pp. 10-14.

However, the consecutive running of sentences as a form of exceptional sentence is specifically authorized by statute. RCW 9.94A.589(1).

Community custody and the like, and the length of community custody terms, is also specifically authorized by statute. State v. Hudnall, a community custody case, does not appear to be authority for the proposition that a court may impose exceptional community custody beyond the statutory maximum, or consecutively. In that case, the defendant argued his sentence to 36 months confinement followed by 24 months community custody violated the statute applicable to his conviction, which required he be sentenced to not less than 36 months community custody. The appellant's purpose was to contend that the prison term necessarily had to be reduced to 24 months, in order that the required minimum term of 36 months community custody could be imposed without exceeding the 60 month maximum for the crime. The Hudnall Court ruled that the inability to exceed the statutory maximum (if 36

months community custody were imposed, per the statute) was a substantial and compelling reason to give an exceptional *downward* departure below the prescribed community custody period. State v. Hudnall, 116 Wn. App. 190, 64 P.3d 687 (2003). The case does not stand for the proposition that a court may enter a term of community custody that exceeds that allowed by law, thus provides no support for the analogy that no-contact orders may also exceed the maximum sentence.

The case of State v. Bernhard did not involve a challenge to the length of a community custody term; rather, the Court held that the exceptional sentence laws in effect at the time allowed the somewhat unusual practice of a trial court specifying a particular treatment *facility* (Teen Challenge Drug Treatment) as part of the community portion of a sentence that was imposed. State v. Bernhard, 108 Wn.2d 527, 530, 537, 741 P.2d 1 (1987). The case certainly does not involve consecutively-run maximum no-contact orders.

The case of Guerin involved a trial court that imposed 15 years community placement, as part of an exceptional sentence,

despite a statute, RCW 9.94A.120(8)(a), that authorized one year of community placement as part of a defendant's standard sex offense sentence. State v. Guerin, 63 Wn. App. 117, 119, 816 P.2d 1249 (1991). The Guerin Court relied on RCW 9.94A.120(11), which the Court read as prohibiting terms of confinement and community placement that exceed the statutory maximum for the crime, thus *authorizing* terms of a length that could equal, though not exceed, the statutory maximum. Guerin, at 120-21. The case does not provide authority for the consecutively-run maximum no-contact orders imposed in the present case.

Finally, in any event, the analogy between community custody and no-contact orders is not apt to begin with. Of course, Ms. Weller's no-contact orders were not imposed as a condition of community custody or the like. Additionally, no-contact orders focus on the protection of individual persons (generally the victim of the crime). In re Rainey, at 377. In contrast, community custody or supervision of an exceptional length may be appropriate as punishment and deterrence or monitoring to prevent future conduct by the defendant. Armendariz noted that RCW 9.94A.030(13)

defined a "crime-related prohibition" as encompassing "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." Armendariz, 160 Wn. 2d at 113. No-contact orders relate to the crime of conviction on a basis individual to the victim of the offense. A person who is the victim of one particular count or counts in a multi-count conviction cannot reasonably be deemed to require *multiplied* protection in terms of years, simply because the defendant committed other counts against other individuals.

Thus the Respondent's argument that the SRA permits exceptional terms of community custody, even if correct, does not mean that courts have authority under RCW 9.94A.505(9) to impose the stacked, consecutive maximum no-contact orders that were issued in this case. There is no statutory authority for the consecutive maximum no-contact orders imposed in this case. Considering the broad, ambiguous language of 505(9), the Rule of Lenity applicable in interpreting the SRA requires this Court to reject the State's urgings that that provision should be read applicable to no-contact orders in such a way that authorizes their

imposition with the exponential severity advocated by the Respondent here. State v. Kozey, 183 Wn. App. 692, 704-05, 334 P.3d 1170, 1176 (2014), review denied, 182 Wn. 2d 1007, 342 P.3d 327 (2015) (citing State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991)).

A final case cited by the Respondent, State v. France, 176 Wn. App. 463, 308 P.3d 812 (2013), review denied, 179 Wn.2d 1015, 318 P.3d 280 (2014), does involve a no-contact order, but the issues litigated in the case did not actually include a challenge to the consecutive running of no-contact order periods, maximum or otherwise. The issue in France was whether the trial court had authority to impose a no-contact order as a community custody provision. Based on aggravators, Mr. France received a 15 year exceptional sentence on 9 counts of felony harassment (which have a 5 year maximum), but which were run for exceptional sentence purposes in concurrent groups of three 5-year sentences, with the three groups run consecutively to each other. State v. France, 176 Wn. App. at 464-66.

The judgment document imposed a 15 year no-contact order and portions of the document appeared to impose the order as a condition of community custody, but the SRA, at RCW 9.94A.701, indicated that community custody was not authorized on the defendant's conviction, which was for felony harassment. France, at 473.

However, the Court of Appeals, relying on Rainey for the holding that no-contact orders are authorized as crime-related prohibitions under RCW 9.94A.505(8), held that the 15 year no-contact order, because it was "scheduled to last only the length of the sentence," need not be vacated; rather, the judgment would merely be remanded for correction of any erroneous reference to community custody, which was the basis for the defendant's argument. (Emphasis added.) France, 176 Wn. App. at 473-74. Crucially, neither the decision, nor the appellate briefs, indicate that the appellant in France actually challenged the length of the no-contact order itself.

2. The Respondent's argument that *State v. France* authorizes a no-contact order beyond the term of incarceration actually imposed would be contrary to Ms. Weller's fundamental right to parent pursuant to *In re Rainey*.

Ms. Weller does not concede the issue that there is no statutory authority to impose any consecutive maximum periods of no-contact, and she asks this Court to reject the State's alternative argument in its Brief of Respondent that France authorizes no-contact orders for the 240-month length of her prison sentence actually imposed. France simply did not address the issue as a question litigated by the parties. See supra.

However, Ms. Weller argues that France, even if it could be read to authorize a no-contact order for the length of the actual exceptional prison term imposed, surely cannot support extension of the no-contact order *beyond* the actual prison sentence, because this would violate Ms. Weller's fundamental right to parent under In re Rainey, 168 Wn.2d 367, 381-382, 229 P.3d 686 (2010), and U.S. Const. amend. 14.

The record below shows that the trial court did not expressly consider the specific length of the no-contact order beyond the sentence of incarceration imposed. The court stated, in ordering the

exceptional sentence of consecutively run periods of incarceration, that it wished to impose the maximum term of no-contact, relying on the re-sentencing prosecutor's argument and the court's summation of the facts for the exceptional sentence that the case involved starvation and physical beating of the victims. 9/17/15RP at 8-9, 27-28; CP 74, CP 87, 89. However, the court did not determine what that period would be in number of years, determine whether such a lengthy period was necessary, or weigh that specific number of years against Sandy's right to parent. Although the court entered a written judgment and sentence imposing a 45 year no-contact period, the only specific term of years that was discussed numerically between the court and the prosecutor was 240 months (20 years). 9/17/15RP at 27-28.

Even if State v. France could, for purposes of argument, be read to authorize a no-contact order for the period of exceptional incarceration actually imposed, any extension of the no-contact order beyond the period of custody, without explicit weighing of the

precise term of years of the order against Ms. Weller's right to parent, would violate Rainey.[1] In re Rainey, 168 Wn.2d at 381-382.

B. CONCLUSION

Based on the foregoing and on her Appellant's Opening Brief, Sandra Weller respectfully requests that this Court reverse her sentence and remand for re-sentencing.

DATED this 23rd day of June, 2016.

Respectfully submitted,

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[1] Ms. Weller made essentially this argument in her RAP 10.10 statement of additional grounds filed April 21, 2016, which is properly before this Court; she argues that the length of the no-contact order interferes with her right to parent under Rainey.

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